84-788 (1)

NO. _____

Office Supreme Court, U.S.
FILED
NOV 14 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

ROBERT F. LANDERS
Petitioner,

V.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY
Respondent,

ON PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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121 pp

QUESTIONS PRESENTED

1. Whether it was error and an abuse of discretion to reward State Farm Mutual Automobile Insurance Company for the results obtained by its counsel's conduct by awarding it judgment over against Robert F. Landers.

2. Whether it was error and an abuse of discretion to deny Landers' Motion to Alter or Amend the Judgment under the provisions of Rule 59 and 60 of the Federal Rules of Civil Procedure.

3. Whether the Judge erred and committed an abuse of discretion in denying the Affidavit for his disqualification and then failing to submit the Affidavit to the Court in conjunction with the Petition for Rehearing En Banc.

4. Whether the Court erred and committed an abuse of discretion in denying Petitioner's Motion for Production of

Tapes or alternatively for a decision approving Statement of the Proceedings When a Report was Made but is not Included in the Transcript and supplement thereto.

LIST OF PARTIES

Candace Gilbert

Wayne Gilbert

Bob M. Quarles

Judy Taylor Quarles

Darrell R. Williams, as Administrator of the Estate of Helen Eileen Williams, deceased

Darrell R. Williams, for and on behalf of Darrell Tyler Williams, and Jay Michael Williams, Minors, as their father and next friend

Darrell R. Williams, Guardian, for and on behalf of Robyn Lee Brakhage

Darrell R. Williams

State Farm Mutual Automobile Insurance Company

Robert F. Landers

Mr. Rex E. Lee, Solicitor General of the United States

The Honorable Donald P. Lay

The Honorable Oren Harris

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I. OPINIONS OF COURTS BELOW

The Panel Decision of the United States Court of Appeals for the Eighth Circuit dated June 26, 1984 is found in 737 F2d 741 (8th Cir., 1984). That Landers' and Williams' Petition for Rehearing En Banc was denied on August 13, 1984, and the Order and

the Opinion are found herein at App. A-43 and A-21.

II. GROUNDS FOR JURISDICTION

The Eighth Circuit affirmed the judgment of the trial court on June 26, 1984, and entered a judgment that same day. Petitioner's Petition for Rehearing was denied on August 13, 1984.

The Petition is filed pursuant to Title 28 U.S.C. Section 2101(c) and Title 28 U.S.C. Section 1254, is believed to confer on the Supreme Court of the United States jurisdiction to review the judgments in question by Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

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STATEMENT OF THE CASE

On the evening of March 27, 1980, an automobile accident occurred involving Robert F. Landers, Bob Quarles, Helen Eilene Williams and Candace Gilbert in Garland County, Arkansas.

Candace Gilbert and her husband, Wayne Gilbert, Oklahoma residents, filed a complaint in the Western District of Arkansas on November 19, 1980 against State Farm Mutual Automobile Insurance Company, insurer of Bob Quarles, and Robert F. Landers. The Gilberts sought damages for injuries incurred as a result of the automobile accident. The vehicle Candace Gilbert was occupying in the rear seat was driven by

Bob Quarles, a Louisiana citizen. Robert Landers (an Arkansas citizen) was the driver of the other vehicle involved. Helen Eileen Williams, (an Oklahoma citizen), wife of Darrell R. Williams, was with Quarles in his automobile and died of injuries incurred in the accident. Her estate and her husband also sued State Farm and Landers. The Gilberts and Williams sued State Farm as Landers was under insured (only $10,000 per person and $20,000 per accident). Quarles held two auto insurance policies with State Farm with uninsured motorist provisions in them, with the total amount of his coverage being $200,000.

Landers had come to Hot Springs for orientation as to his responsibility as the newly elected secretary-treasurer of the Mt. Ida Lions' Club and had missed the meeting due to their holding a Greek dinner at another location. Before returning to Mt. Ida, Landers consumed several beers.

Landers received head injuries in the accident and had amnesia as far as the facts of the accident. Landers did not have the money to personally pay for an accident reconstruction expert, and pled guilty to a manslaughter charge in connection with the accident for the death of Helen Eileen Williams.

On February 1, 1982, Judge Harris in a pre-trial order applied Louisiana law and ruled that the two State Farm Auto Insurance policies of Quarles that covered the uninsured motorist should be stacked.

During a hearing on Landers' Motion In Limine before the trial in August, 1982, Landers' position was that the blood test was defective and that it should not be mentioned to the jury during opening statement or during the course of the case. The State Trooper's report revealed that he could not identify the name of the person who had taken the blood test and the signature of

that person was not attached to the label on the blood test. It was Plaintiff's position that the blood test was a scientific test and that the result of the test was not admissible since they could not lay a proper foundation that this was even Landers' blood or the meeting of the necessary requirements in the taking and preservation of his blood to insure its accuracy. At this point, Plaintiffs' attorneys indicated that they would lay the necessary foundation before the blood test was introduced and the court indicated that this should satisfy Landers' concern at this stage in the proceedings and he would rule on it at the time they laid the foundation for the introduction of the blood test during the trial. During the trial, the court gave Landers' attorney difficulty in cross-examining the State Trooper (T. 265-296) and the court permitted Plaintiffs to introduce Landers' alleged blood test without laying a foundation

contrary to his ruling during the hearing and would not let Landers' attorney cross-examine the State Trooper on the blood test, and further prohibited Landers' attorney from arguing in closing argument that the blood test was in fact defective (T.R. 32) and should therefore have been completely disregarded by the jury. The court declined to permit Landers' attorney to cross-examine the State Trooper concerning the possibilities considered by him other than Mr. Landers' alleged intoxication in determining what caused Landers' vehicle to hit the bridge railing and whether he had negated any of these possibilities.

Landers' vehicle had been traveling west toward Mt. Ida, and struck a bridge railing in a heavy downpour causing his vehicle to go into the eastbound lane whereupon it was struck by the vehicle driven by Quarles and knocked back up on the southern bridge railing. As contended by

Plaintiff, Plaintiff's proof showed that Landers struck the bridge railing due to his intoxication. As contended by Landers, Landers' proof showed that he struck the bridge railing because he was trying to go as far to the right as possible to avoid a head-on collision with Quarles who was approaching the bridge in Landers' lane of traffic. Quarles thereafter returned to his proper lane of traffic from Landers' lane and drove Landers' vehicle back upon the bridge railing.

The court would not permit the State of Arkansas' medical examiner or the State Trooper to testify concerning the role of the seat belt and shoulder harness in preventing Helen Eileen Williams' head from striking the dashboard as she did which caused her death. The court sustained objections to Landers' attorney's questioning without foundation in the law and the court refused to permit Landers'

attorney to cross-examine Darrell R. Williams and the coroner about his anger and hostility in discovering his wife was with another man rather than his concern over her death. The court showed impatience and anger during Landers' attorney's questioning of the witnesses. The court failed to give the instructions as requested by Landers and standard parts of instructions given that were favorable to Landers were ommitted and failed to give Landers' theory of the case and gave an instruction in a criminal case.

At several different stages during the proceedings, State Farm's counsel told the jury that it would take no position on Mr. Landers' liability as evidenced during the opening statement and during his cross-examination of Mr. Quarles. "I promised the jury that I wouldn't get involved in how the accident happened at all, I'm going to keep my word", and then State Farm's attorney

supported Landers' attorney in the blood test question (T. 303) and at State Farm's counsel's request, Landers' attorney agreed to permit State Farm's attorney to follow Landers' attorney out of turn in closing arguments. (T.R. 34)

Due to Landers' amnesia, his proof was based upon the jury believing his accident reconstruction expert. Immediately following the closing argument of Landers' counsel, State Farm's attorney's argument which was to be limited to damages if the jury should find Landers at fault, were prefaced by his statements that attorneys will do what they think necessary to win a law suit and that is what attorneys are paid to do. (T.R. 35-36 and T.R. 42) State Farm's attorney then argued with regard to expert witnesses, "It's been my experience on this earth that someone can be paid to come into court and say anything, and they can." - (T.R. 42) After attacking Landers' attorney

and the expert witnesses, State Farm's attorney stated the other parties were represented by their attorneys and his client was a company and that before the trial he really didn't know who had to bear the lion's share of the responsibility for this accident and now he believes he does. The jury had to understand that the thing that would help him the most is if he could look them in the eye and say that Mr. Landers didn't have any responsibility for this accident, since his client wouldn't have to pay anything. He just had to be honest with them and tell them the truth and he can't say that. Of course, Mr. Landers has to bear some of the responsibility for this accident. ...In making this representation, State Farm's attorney was protecting its insured Quarles who Landers' proof showed was at fault for the occurrence and making sure that Quarles prevailed on his subrogation claim against Landers. (T.R.

37-38)

Landers' attorney objected to State Farm's counsel's argument; however, the court did not admonish State Farm's attorney but stated simply, "Proceed". (T.R. 40)

Landers' objection was repeated at the close of State Farm's counsel's argument including a request by Landers for a mistrial which was denied by the court followed by Landers' request for a cautionary instruction which was also denied by the court and Landers also objected to State Farm's attorneys testifying and argument about experts. (See Clerk's record: Order Settling and Approving Statement of the Proceeding when no Report was Made, entered March 2, 1983.)

Landers, State Farm and Williams filed a motion for judgment and the court entered the judgment prepared by State Farm's attorney on September 27, 1982 (App. A-7) and thereafter entered an addendum to the

judgment on October 5, 1982. (App. A-17)

Landers filed a motion to alter or amend the judgment which was denied. (App. A-18)

The law suit herein was filed on the basis of diversity of citizenship and amount.

When the court reporter would not reproduce portions of the transcript which Landers had designated and for which he had paid the court reporter to have reproduced, the United States Court of Appeals directed that Landers file a Statement of the Proceeding when a report is made but is not included in the Transcript so that it could be approved by the trial court which Landers did, to which State Farm objected, first as to doing it, and then to that portion that contended that the transcript did not fully reflect all statements made by him during argument. Landers' statement of what is missing in the transcript was the discussion

on the motion in limine as to the blood tests, and the defects in the scientific method, and the ruling of the court, portion of Dr. Malak's testimony with regard to Helen Eilene Williams having her knees up on the dashboard when she would have in all probability received fractures at the time of impact since she did not have fractures, that was not the way she was sitting, but rather that it was his conclusion that she was sitting toward the middle of the car leaning over in the direction of Quarles. It fails to cover Landers' motion for a directed verdict, at the conclusion of the Plaintiff's case and conclusion of all the evidence, and the court reporter failed to include the liability section of the attorneys for Williams and Gilbert which were primarily based upon Landers' liability having to do with the blood test establishing his intoxication and Dr. Malak's testimony about oxidation. It

was obvious that his reading on his blood test was significantly higher at the time of the occurrence.

Landers had previously objected to the blood test and believed that his objection to the reading of the blood test was renewed during argument of counsel and further believes that State Farm's attorney presented in a testimonial fashion, his opinion that Landers was obviously intoxicated at the time of the accident and State Farm's attorney was speaking very rapidly and his argument about experts should have covered substantially more material in the transcript than was reflected therein and the gist of argument was that anybody with any common sense should not believe an expert witness since he is paid to say what he says.

After State Farm's objection, Landers filed a supplement to Statement of the Proceedings pointing out that State Farm's

objection was only to a limited portion of Landers' statement, further attaching exhibits evidencing that the transcript did not cover the closing argument, Williams and Gilbert's attorneys, and other exhibits to establish the accuracy of Landers' attorney's statement of the hearing on the motions in limine.

These were submitted to the court but the court refused to rule on the Statement of the Proceedings or on the Objection contending the matter was now in the United States Court of Appeals and then after this request was repeated by Landers' attorney advising that he was following the procedure directed by the United States Court of Appeals, the trial court declined to rule and Landers filed an Objection. Thereafter, prepared a Motion for Production of Tapes or alternatively for a Decision Approving Statement of the Proceedings when a Report was Made but is Not Included in the

Transcript and Supplement thereto which was filed in the United States Court of Appeals.

On the morning of oral argument in this case at Omaha, Nebraska, the court ruled that since Landers' attorney had not filed his Appearance Form for the argument that he would only be given five minutes, although Landers' attorney was scheduled for the full twenty or thirty minutes in the Notice of Oral Argument published by the court.

In the panel's opinion, the court rejected as frivilous Landers' contention that State Farm's counsel prejudiced Landers by allegedly making improper closing argument, finding that State Farm's counsel did not mislead the jury, but frankly and accurately stated State Farm's position.

Landers filed a Petition for Rehearing en banc and stated that if permitted by the rules and statutes, that it also be based upon the Affidavits of Disqualification of the Honorable Donald P. Lay and the Motion

for Production of Tapes or alternatively for a decision approving Statement of the Proceedings when a Report was Made but it not Included in the Transcript and Supplement thereto.

On August 13, 1984, the court filed a Supplemental Order concerning Williams' request for a correction of the Opinion (App. A-3) and denied Landers petition for rehearing en banc without stating whether it had been considered by the court en banc, denied Landers' motion for production of tapes (App. A-43), and the Chief Judge denied the Affidavit for his Disqualification and further denied the alternative motion for en banc consideration on the basis that the denial of the Petition for Rehearirg en banc has been entered and there is no further matter pending before the court and directed that no further filings will be received by this court concerning this case, and in the event Landers' attorney failed to

adhere to this court's direction in that regard, it could result in sanctions being imposed against Landers' attorney. (App. A-47)

ARGUMENT FOR ALLOWANCE OF THE WRIT

Landers' proof shows that State Farm's attorney engaged in improper closing argument which was contrary to Landers right to due process of law and deprived Landers of his right to a fair trial. Moreover, the court's response to Landers' objection to State Farm's argument had the effect of condoning the argument and implying to the jury that it was perfectly appropriate. The panel's rejection as frivilous, Landers' contention that the fraudulent argument, testimony and attacks upon the attorneys and upon the experts..."that gentlemen from the Meninger Clinic is just like all the other experts...really will tell you frogs will fly and whatever...he's paid." (T.R. 56), is contrary to Landers' constitutional right of

a fair trial and fair appeal. Therefore, certain fundamental questions of fairness in the Federal Justice System are raised which this court needs to address, because the protection of the fairness of judicial process is of substantial interest central to the maintenance of liberty.

Whether it was error and an abuse of discretion to reward State Farm Mutual Automobile Insurance Company for the results obtained by its counsel's conduct by awarding it judgment over against Robert F. Landers.

It is Landers' position that the court intended for Landers to lose and that defense counsel's misconduct was an essential vehicle to the attainment of that result all of which was contrary to the constitutional right of Landers to due process of law and a fair trial.

In terms of whether prejudice was rendered to Landers by virtue of conduct of

State Farm's counsel, an essential task for the jury was to determine why Landers' vehicle struck the bridge abutment in the heavy downpour.

It was the Plaintiff's position that since Landers had been drinking and based on the blood alcohol test of a .16 which showed that he was intoxicated, Landers' statements and his guilty plea to the manslaughter charge and the testimony of the witnesses after the accident, it is obvious that the reason that Landers' vehicle collided with the bridge abutment is because he was intoxicated.

In contrast, Landers' proof showed that as Landers' vehicle approached the bridge, Quarles' vehicle was in Landers' westbound lane of traffic causing Landers to take proper evasive action of going to the right to avoid a head-on collision which resulted in Landers' vehicle hitting the bridge and then spinning into the eastbound lane, with

Quarles' vehicle coming back from the westbound lane (Landers' lane) to the eastbound lane (Quarles' lane) when the impact occurred driving Landers' vehicle back up on the southern bridge railing.

First, concerning the blood alcohol test which Landers' proof showed was defective, Landers had objected by a Motion in Limine, Plaintiffs had stated that they would lay the proper foundation when attempting to introduce the result of the test, which the court held should satisfy Landers' concern at this stage. In fact, Plaintiff introduced the blood test without laying any foundation at all through the investigating officer, Arkansas State Trooper, Chancellor, over the objections of Landers' attorney. (T.R. 256-257)
Subsequently, the court ruled that Landers could not argue that the blood test was defective in closing argument. (T.R. 30,8)
So that a blood test that was defective in

terms of scientific methods was then permitted to be introduced without a foundation and the court then ruled that the results of the blood test were binding on Landers and that Landers could not challenge that it was defective or its accuracy.

With regard to Landers' comment at the criminal hearing - more than one too many; the state contended his drinking caused the accident and if one caused the occurrence, it would have been one too many. Plaintiff's contentions Landers had previously had the accident reconstructed were refuted. (T.R. 228, 229)

The investigating state trooper testified that when he asked Mr. Quarles what happened, Mr Quarles indicated that as he was coming on the bridge, he saw Mr. Landers' vehicle for the first time sliding sideways in his lane. (T.R. 283) The state trooper further testified that Quarles told him the first thing he knew, the vehicle was

in front of him and he didn't have time to do anything, hit his brakes or otherwise. (T.R. 281) "He had no time to do anything." (T.R. 282) Further, there was no proof whatsoever that would indicate that he (Quarles) had not crossed the centerline at that point striking Mr. Landers' Blazer. (T.R. 280) The state trooper's testimony and the drawing of the accident scene reveals that Quarles would have seen Landers' vehicle for the first time approximately 15 to 30 feet away from impact. Quarles testified that he didn't believe that he had made this statement to the state trooper, but then admitted that he was not sure that he hadn't. Quarles testified that his speed at the time was 50 mph or less. (T.R. 327) Concerning whether Landers was involved in erratic, drunken driving, Quarles testified there was nothing unusual about Landers' driving as he approached that brought him to his attention. (T.R. 328,

329) The State Trooper was not able to say that the beer cans or bottles in Landers' vehicle had any relationship to this occurrence. (T.R. 275) There was a steady heavy downpour. (T.R. 329) Further, Quarles had no recollection that his bright lights were not on at the time of the collision. (T.R. 330) Nor could Quarles say if immediately prior to the accident, whether he did or did not look away from the road. (T.R. 334)

Ernest Farr of the wrecking crew testified that the Blazer's right rear bumper was up on the bridge, on the rail. (T.R. 361) The front wheels of the Pontiac turned to the right. Warren Farr testified that the Blazer's right corner was up on the bridge railing. (T.R. 365)

Dr. Fahmy Malak, the Chief Medical Examiner for the State of Arkansas, testified in Landers' behalf that the position of the bodies in Quarles' car and the

types of injuries they sustained were not the type ordinarily received when one is facing straight ahead and bracing for an accident. (T.R. 159-173) According to Dr. Malak, the positioning and injuries indicate that Quarles and Williams were turned toward each other.

The state trooper testified that Mr. Quarles was probably inattentive. (T.R. 292) Also about the defects in the blood test. (T.R. 273, 274) Dr. Malak testified concerning the defects in the blood testing (T.R. 183-185), and the oxidation of the alcohol in the blood, which would actually have reduced the affect of the beer on Landers. (T.R. 173)

On direct examination, Quarles contended that his being with Helen Eileen Williams was a meeting of platonic childhood friends rather than a rendezvous of former lovers. On cross-examination, Quarles admitted that he and Helen Eileen Williams

had previously had a romantic relationship. (T.R. 318-319 and 339)

Finally, we have the testimony of Steve Jackson, one of Arkansas' three or four state troopers who serves as an expert in accident reconstruction for the Arkansas State Police, and Joel Hicks, an engineer.

Hicks, the engineer, and Jackson, the accident reconstruction expert, determined that there were three possibilities for the occurrence. One, the evasion of a head-on collision produced by Quarles' vehicle being in Landers' lane as he approached the bridge. Two, other possibilities, that being the heavy downpour, bright lights, intoxication. Three, hydroplaning. This is one of the portions where the transcript is incomplete. (T.R. 100-101) Hicks determined that the angle of Quarles' Pontiac was that of 2 to 7°. (T.R. 135) The engineer's conclusion is set forth. (T.R. 124) Testimony of these gentlemen show that from

all facts available at the scene such as the point of impact on the bridge, the point of impact on the cars, the positions of the automobiles after the impact with Landers' Blazer being up on the bridge railing, the vehicles respective speeds, the location of Landers impact with the bridge, the friction of the road with the tires, and the laws of physics as applied to these factors, with the assistance of the use of the computer, resulted in their conclusion, (T.R. 86-93, 100-101, and T.R. 115-131) that the probable explanation for the occurrence was that Quarles was approaching the bridge in Landers' proper lane of traffic and Landers took the proper evasive action or going to the right to avoid a head-on collision when his vehicle struck the bridge abutment causing it to spin into the other lane when Quarles' vehicle returned to his proper lane driving Landers' vehicle back upon the bridge railing. (See

Landers' Computer Exhibit 17)

When Landers' attorney had asked the investigating State Trooper, Chancellor, "are there any other reasons or causes for a vehicle hitting the bridge besides alcoholic beverages in a rain," the State Trooper answered, "Yes sir...several reasons." And then when Landers' attorney asked the State Trooper to tell the jury what other reasons exist, the Plaintiff's attorney's objected like kernels of popcorn in hot oil. In sustaining their objection by requiring Landers' attorney to ask a specific question, the State Trooper was on cross-examination and it was not the court's perrogative to prevent Landers' attorney from asking a general question. (T.R. 271)

The reason that Plaintiff's attorneys were objecting at this point was that the state trooper in terms of differential diagnosis, was really not able to eliminate these alternatives. Moreover, if you accept

Plaintiff's explanation of the occurrence that Quarles was in his own lane, that would have been destroyed by Landers' accident reconstruction expert as follows.

If Quarles' vehicle had been traveling straight down his own lane at impact, since his vehicle hit Landers' vehicle behind its center of mass, Landers' vehicle would then have been driven either to the left back toward the westbound lane at impact or driven straight down the eastbound lane. The accident reconstruction expert testified that the accident did not happen that way. Landers' vehicle was in fact driven by Quarles' vehicle to the right of the collision point up against the south bridge railing by the momentum of Quarles' vehicle. Therefore, Quarles' vehicle was coming back over from the westbound lane (Landers' lane) to the eastbound lane (Quarles' lane) when the impact occurred. (T.R. 91,92) From the State Trooper Chancellor's description of

Mr. Quarles' fault in causing this accident at page 292 in the Transcript, it's obvious that in his judgment Mr. Quarles was not keeping a proper lookout and that his speed was excessive under the circumstances and that he could not have kept his vehicle under control.

State Farm's attorney's approach was to attack and destroy Landers' attorney's credibility and that of Landers' expert witnesses, with State Farm's attorney's further confession that Landers was at fault in causing the accident thereby avoiding consideration of Landers' proof, including Mr. Farr's testimony, (T.R. 366) concerning the state trooper's questioning of Mr. Quarles as to his relationship to the lady in the front seat, which the jury could have found was indicative that Quarles' relationship with her was actually romantic and not a platonic one, and given the opportunity for furtherance of that relationship when they

returned to the trailer, the jury could well have found that the transportation was for their mutual benefit and as such, Helen Eileen Williams was not guest. Moreover, the jury could have found based upon Dr. Malak's testimony as to the location of Helen Eileen Williams in the seat near the center leaned over facing toward Quarles, and with Quarles turning toward her, (T.R. 159-173) evidenced Helen Eileen Williams' comparative fault in distracting Quarles' attention thereby preventing him from keeping a proper lookout. Her desire to be close to be Quarles and the distraction that produced could further have been considered by the jury in connection with the reason why she failed to fasten her safety belt and therefore the cause of her death as there were no invasions or significant damage to the interior of the compartment other than that produced by Helen Eileen Williams striking her head on the dashboard. (T.R.

159-173) Further, had it not been for the destruction by State Farm's attorney of Landers' attorney's credibility and that of his expert witnesses, the jury could have found that Quarles behavior in driving approximately 50 mph in a lane of oncoming traffic while in a steady downpour of rain while approaching a bridge and while his concentration was wrapped up in Helen Eileen Williams, constituted willful and wanton disregard of safety in any event.

State Farm's counsel having set the stage by his position that he would cover damages only while Landers' counsel covered liability, then proceeded with his attack, that attorneys will do what is necessary to win a lawsuit and that is what attorneys are paid to do. (T.R. 35,36 and 42) This argument falls within the framework of Weaver v. State, 56 Ala. App. 29, 318 So.2d 768, cert. den. 294 Ala. 773, 318 So.2d 772.

State Farm's argument following that of

Landers' counsel was adroitly structured to imply that Landers' counsel would lie, cheat, fabricate evidence and do what he thought necessary to win the lawsuit on Landers' behalf. Not only were State Farm's attorney's remarks improper and in the nature of testimony as directed to Landers' counsel, but they were also improper in the nature of testimony with regard to Landers' expert witnesses. "It's been my experience on this earth, that someone can be paid to come into court and say anything, and they can,"(T.R. 42) and "that gentlemen from the Menninger Clinic is just like all the other experts...really will tell you frogs will fly and whatever...he's paid." (T.R. 56) State Farm's counsel's argument falls within the provisions that while counsel may within reasonable limits criticize or comment on the interest of opposing witnesses as effecting their credibility, attacks upon character or upon expert witnesses who have

testified for the opposing litigant are improper in the absence of evidence to justify the accusations. See F.W. Woolworth v. Wilson, 74F2d 439 (CA 5 Tex.); Aetna Life Insurance Co. v. Kelly, 70 F2d 589 (CA 8 Mo.) and See Section 305, 75 Am Jur 2d Trials at page 379 and 380.

Counsel for State Farm, after improperly attacking Landers' attorney and expert witnesses, then proceeded in his most improper and damaging comments of his closing argument. He represented to the jury all the other parties were represented by their own attorney, and that he represented a company, State Farm. "I've told you from the very beginning that if in your judgment these people were entitled to be compensated, then State Farm is ready to compensate them...and they are. That's the way I feel about it. I told you that just like you I had to listen to this case. I wasn't out there. I didn't know before we

started who really had to bear the lion's share of responsibility for this accident. Now I believe I do know that. I didn't know when I started...just like you do. But I suspect just like you...I think I know. In other words you must understand that the thing that would help me the most is if I could look you right in the eye and say Mr. Landers didn't cause this accident. If I could and mean it, State Farm doesn't owe anybody any money and I could go home. As hard as I wish that was the truth, that's just not. That's going to make Mr. Matthews mad. He's ably represented Mr. Landers, but in my judgment...if I'm going to stand up before you and be fair and ask you in truth to think I'm being fair with you...I can't say that. Of course, Mr. Landers has to bear some of the responsibility of this accident. To suggest otherwise is...as to whether Helen Eileen Williams and Mr. Quarles must also bear some

responsibility...you know...that's your province. I am not expert enough to sit through the maze of expert testimony and reach a conclusion. I don't know. I'm glad you've got to do that. But as to Mr. Landers, my own common sense tells me that he probably behaved or certainly behaved in a way he shouldn't have...and he's got to bear some responsibility for his action. I wish I could say otherwise, but I can't." (T.R. 37-38)

Landers' attorney objected to State Farm's counsel's argument, but the court did not admonish State Farm's attorney, but said simply, "Proceed". (T.R. 40) The court not only did not sustain Landers' objection, nor express disapproval of State Farm's comment, but by virtue of his ruling, the court implied to the jury that State Farm's attorney's statement was perfectly proper and correct.

Under these circumstances, the case of

Jennings v. Murphy, 194 F2d 35 (CA Ill. 1952) is pertinent. See also Roy v. Employers Mutual Casualty Company, 368 F2d 902 (CA 5th, 1966):

> "The argument obviously was improper, and if the trial judge had reacted with silence a reversal would be mandatory. There was no silence. The jury was speedily and emphatically admonished in plain and unmistakable terms. Counsel was warned not to repeat the argument. Did this remove the potential for prejudice so as to avoid the necessity for a new trial? We answer in the affirmative, not forgetting plaintiff's failure to move for a mistrial, which had the effect of taking his chances on the verdict and being afterwards free to say that he should have another hearing.
> To the great credit of the Bar in this Circuit, and elsewhere in the United States, it may be said that precedents dealing with improper argument of counsel are relatively scarce. It is well settled, however, that prejudicial remarks, if the prejudice is not removed, will cause a reversal. Moreover, it is recognized that argument may be so inherently and incurably prejudicial as to be incapable of removal."...

In the case at bar, counsel for Landers objected to State Farm's attorney's comments, moved for a mistrial and for a

cautionary instruction, all of which were denied. (See Order Settling and Approving Statement of the Proceedings when no report was made, entered on March 2, 1983)

State Farm's attorneys conduct is totally improper as per the Code of Professional Responsibility, DR 7-106 Trial Conduct, (C)-(3) and (4).

In addition, see H.K. Porter Co., Inc. v. Goodyear Tire and Rubber Co., 536 F2d 1115 (CA Ohio 1976), Romeo v. Youngberg, 644 F2d 147 (CA Pa. 1980), Kiefel v. Las Vegas Hacienda, Inc., 39 F.R.D. 592 affirmed 404 F2d 1163, cert. den., 395 U.S. 908.

Further, see Minneapolis, St. Paul and Ste. Marie Ry. Co. v. Moquin, 283 U.S. 520, 51 S.Ct. 501, 75 L.Ed. 1243 (1931); New York Central Railroad Co. v. Johnson, 279 U.S. 310 (1929); Koufakis v. Carvel, 425 F2d 53 (2nd Cir. 1970); Brown v. Walter, 62 F2d 798 (2nd Cir. 1933).

For parallel cases wherein officers are

deprived of the evidentiary use of the results of their unconstitutional conduct thereby resulting in dismissal of charges or a finding by the court or the jury of not guilty in many instances. See Brown v. Mississippi, 297 U.S. 278 (1936), Hanes v. Washington, 373 U.S. 503 (1963), Sims v. Georgia, 389 U.S. 404 (1967), Rochin v. California, 342 U.S. 165 (1952).

State Farm's argument mislead the jury so that they could not render a fair verdict on the facts and the law. Even so, the jury still found that Quarles was also at fault in causing this occurrence.

The decision of the panel is contrary to the provisions of Rule 17 of this court and has the effect at this juncture of approving fraud, dishonesty, attacks on attorneys and experts without foundation in the evidence and the record, and dirty tricks as a means to the end, winning the trial.

Would it be appropriate for a classroom teacher to bring a student that she had caught cheating and being dishonest on a test to the front of the class, and reward the student for his behavior in front of the class?

If that is the lesson the court teaches, won't defense counsel continue to use these tactics? In contrast, Landers simply asks that this court teach State Farm and its attorneys that trials in federal courts must be won fairly and that this court does not approve of fraud, dishonesty, attacks on attorneys and experts and assorted dirty tricks as a means of winning trials, nor of an appellate court approving such tactics.

By virtue of these arguments separately and collectively the judgment that State Farm has obtained against Robert Landers should be extinguished. In the United States where our justice system is founded

on fundamental fairness, a party should not be rewarded for a result which may well have been obtained by their counsel's intentional improper conduct to attain it.

Whether it was error and an abuse of discretion to deny Landers' Motion to Alter or Amend the Judgment under the provisions of Rule 59 and 60 of the Federal Rules of Civil Procedure.

By virtue of State Farm's attorney's conduct, the court under its equity powers should alter and amend the judgment to eliminate State Farm's judgment against Mr. Landers.

See Rule 59 and 60 of the Federal Rules of Civil Procedure and Rule 8, F.R. Civ. P.

> "All pleading shall be so construed as to do substantial justice.

Further, in regard to Landers not originally referring to both Rule 59 and Rule 60 of the Federal Rules of Civil Procedure that under Rule 8(c) that when a

party has mistakenly designated a pleading...if justice so requires, the court shall treat the pleadings as if there had been a proper designation.

In addition, see Wright and Miller, Section 1286, Construction of Pleadings, Conley v. Gibson, 355 U.S. 41 (1957), which states, All the Federal Rules require is..."a short and plain statement of the claim which will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rest."

It is an established maxim that equity will not suffer wrong to be without a remedy. See 27 Am Jur 2d EQUITY at Section 120, page 647:

> "The rule is stated that where there is a right which the common law, from any imperfection, cannot enforce, it is the province and duty of a court of equity to supply the defect and furnish the remedy."

With regard to any contention being made concerning precedent, see section 121

of 27 Am Jur 2d EQUITY at page 648 and 27 Am Jur 2d EQUITY at Section 20 on page 542:

> "One of the most important grounds for equitable intervention is fraud or fraudulent misrepresentation or concealment. Indeed, there is probably no other ground of which jurisdiction in equity is so readily entertained and freely exercised."

In addition, see Section 23 of 27 Am Jur 2d EQUITY at page 547.

In order that fairness may be had in this proceeding and improper conduct appropriately dealt with, the judgment should be altered or amended to eliminate State Farm's judgment against Landers, either under Rule 59 or Rule 60, or both, of the Federal Rules of Civil Procedure.

Whether the Judge erred and committed an abuse of discretion in denying the Affidavit for his disqualification and then failing to submit that to the Court in conjunction with the Petition for Rehearing En Banc.

The panel rejected as frivilous

Landers' contention that State Farm's counsel prejudiced Landers by allegedly making improper closing argument. The panel found that State Farm was clearly entitled to judgment over and against Landers based on the jury's finding of liability on the part of Landers, and that State Farm's counsel did not mislead the jury, but frankly and accurately stated State Farm's position with respect to assuming responsibility for the damages that Plaintiff sustained in the accident.

In this connection, the panel has found that it is perfectly appropriate in America for defense counsel to present to the jury in a testimonial fashion that the adverse party, Landers, was at fault for the occurrence, and to mislead the jury to believe that State Farm was an independent and impartial party to this lawsuit and that

it was solely to State Farm's detriment for the jury to find that Landers was at fault, when in fact State Farm's attorneys obviously made these statements to protect State Farm's insured, the adverse driver, Quarles, whose Landers' proof showed was at fault for causing the occurrence, and to enable State Farm to prevail on its subrogation claim against Landers.

When this decision is considered in light of Chief Judge Lay's comments on the Ted Koppel television program on ABC, set forth in the affidavit for his disqualification, and in further light of his comments on the ABC television program about Star Chamber proceedings and the importance of due process of law and that the integrity of the judicial process must be preserved; it must be submitted that it was totally inappropriate for Chief Judge Lay to make that comment where pending before the court in the Bratton v. Safeway case, which is

presently pending in this court, being case number 84-618, in appellant's petition for rehearing en banc at page 11 (e) this issue was presented:

> "If it is an obstruction of justice to prevent a witness from testifying either physically or by threats, because it affects the right of a fair trial and the result, is it any less a breach of trust or breach of duty for federal judges to prevent a party from having a fair trial and then trying to cover it up?"

Having made that statement before millions of people, Chief Judge Lay must then administer to try to support his statement and cover up the judge's wrongdoing in both cases rather than administer consistent with the responsibility of fairness and impartiality in attaining a just result in the appeals before his court under his oath, under our Constitution and our rule of law.

In the Bratton v. Safeway case, being case number 83-2450 WA when it was in the United States Court of Appeals for the Eighth Circuit, it was advised that the

court has instructed that no more pleadings be filed therein wherein it was contended that what had taken place in the case was politics and not justice, and Chief Judge Lay's involvement in attaining that political result which is unfounded in our Constitution and our law was questioned. (App. A-45)

In this case, Landers had requested that if the Motion for Recusal of the Honorable Donald P. Lay were denied by Judge Lay, that the motion for his recusal be considered en banc in conjunction with the Petition for Rehearing En Banc and the Motion for Production of Tapes. The response to that request is found at App. A-1 and A-43.

If the Chief Judge believes that in the course of due process his administration will be challenged as being contrary to the Constitutional rights of certain parties, then what better way of avoiding that

challenge than ruling that no further pleadings can be filed, with a veiled warning of a federal penitentiary sentence if you do. That ruling is contrary to fundamental fairness and is not consistent with due process of law and is further evidence of Chief Judge Lay's inability to be fair and impartial in this proceeding.

There is an irony in the application of Title 28 USC §144 and §455 in that it requests that the Judge make a responsible decision when, in fact, the very reason that the affidavit for his disqualification is being filed, is because the average man on street with full knowledge of the circumstances would question his ability to be fair and impartial; in other words, his ability to make responsible decisions.

In any event, it is not appropriate for the Chief Judge to punish an attorney for his efforts to hold our justice system accountable. See Gill v. Stolos, 240 F2d

669 (2nd cir., 1957). Judges of the federal courts of the United States constitute the primary safeguard of the freedom of our country and our rule of law.

Petitioner therefore submits that the fairness and impartiality of the Honorable Donald P. Lay may reasonably be questioned under the circumstances of this case and that he either has a bias or prejudice against Landers' counsel which is so prevailing as to constitute a bias or prejudice as to Landers or succumbed to the lure of power and was therefore unable to resolve the issues in this appeal in a fair and impartial manner and exercised his influence as Chief Judge on the other judges on the panel who succumbed thereto.

Thus far, our government has approved the means of fraud, dishonesty, destruction of Landers' attorney's credibility and that of Landers' experts, cheating and other assorted "dirty tricks" to win, which deci-

sion on the part of the court Landers respectfully submits is contrary to our Constitution, our law and the values of this country. See United States v. Phillips, 64 F2d 971 (CA Florida 1981) and ex parte N.K. Fairmount Co., 194 F.Supp. 978 (DC Ala. 1912), Potashnick v. Port City Construction Co., 609 F2d 1101 (CA 1980) and U.S. v. Poludniak, 657 F2d 948 (CA MO 1981).

The court in its decision-making process can come from a base either of authority or power with all authority coming from God as stated in the Holy Bible in Romans 13:1 so that the court in seeking the help of God as requested in their oath of office can by humbling themselves to be obedient to God, act agreeably with our Constitution and our law. In contrast, the other decision-making base is one of power which is to say that God gave the court free will just like he gave all other human beings free will and as such they can do

whatever they want to do for whatever reason even though such action is diametrically opposed to our Constitution and diametrically opposed to our law.

If the leadership of the court uses power rather than authority, then by virtue of his example, he encourages all the other judges on his court and also the United States District Judges to do the same, which ultimately affects not only Landers' constitutional right to a fair trial and due process of law, but that of all people in this country. As Chief Justice Warren E. Burger stated in the National Forum, Fall 1984 issue at page 33,

> "...There is risk that power can be abused...Chief Justice Harlan Fiske Stone reminded all federal judges that 'the only check upon our own exercise of power is our own sense of self restraint'."

Under the circumstances, would the average person on the street with full knowledge of the circumstances harbor doubt

about Chief Judge Lay's impartiality? Chief Judge Lay should be disqualified by this court as by their example, the leadership of each of our appellate courts should encourage all judges to use authority rather than power and should further encourage them to attain the very best that is within them.

Whether the Court erred and committed an abuse of discretion in denying Petitioner's Motion for Production of Tapes or alternatively for a decision approving Statement of the Proceedings When a Report was Made but is not Included in the Transcript and supplement thereto.

Rather than using the concept of reversible error, when confronted with a motion for production of tapes, it is perhaps more appropriate to recognize that a trial Judge is in a position where he can choose whether a party has a fair trial or not. See Hazel Glass Co. v. Harper Empire Co., 322 U.S. 238 (1944) and London Guaranty Co. v. Woeffle,

82 F2d 325 (8th Cir., 1936).

In order that the court may accurately determine this case on appeal and so that the court can insure due process of law and the preservation of the integrity of the judicial process in future cases in this country, Landers prays that the court listen to the tapes of this trial, as it is Landers' position that the jury decision and judgment below was not obtained by a fair and impartial trial, but rather the Judge chose that Landers lose the case and the jury's decision was marionetted and orchestrated by the court. Under the circumstances Petitioner's right to a fair appeal should not be affected by virtue of the critical matters missing from the transcript.

The motion covers those things that evidence that the court was fair and those that he chose that Landers lose. Due to Landers' amnesia and guilty plea, his

insurance company had settled the case without an accident reconstruction and when Plaintiff backed out, the court granted a continuance, denied Plaintiff's motion to prevent Landers from calling any witnesses, made rulings favorable to Landers on expert witnesses and the computer accident reconstruction and on punitive damages and other matters.

Although covered in greater detail in the Statement of the Case, some of the things ommitted from the Transcript which are deemed of critical significance are the proceedings on the motion in limine concerning the blood tests and the court's ruling prior to trial, Dr. Malak's testimony as to the effect of Helen Eileen Williams' having her knees up on the dashboard, critical portions of Hicks' and Jackson's expert testimony, Landers' motions for a directed verdict, the liability section of arguments of Plaintiff's attorneys, emphasizing in the

greatest of detail Landers' alleged intoxication which is based primarily on the blood test, portions of State Farm's attorney's argument concerning the experts, Landers' objections to closing argument of State Farm which was actually recorded by the court reporter but does not appear in the Transcript, his requests for a mistrial which was denied and the cautionary instruction which was also denied.

Landers' motion sets forth those things which the court did which Affiant believes evidence that it was the court's decision that Mr. Landers should lose this trial.

The court must preserve the integrity of the judicial process if respect and confidence of the people in our federal justice system is to be maintained and our form of government long endure. United States v. Nixon, 418 US 683 (1973). In an article in the National Forum, Fall 1984 issue, Senator Orrin G. Hatch quoted the noted French

jurist, Alexis de Tocqueville, who admonished later generations that, "America is great because she is good, and if America ever ceases to be good, America will cease to be great." See also the quote from Francis Grund in the same article at page 35. To deny Plaintiff's motion in this case, is to condone corruption in the integrity of the federal judicial process and encourage its practice in the future, and therefore Plaintiff's Motion should be granted. Alternatively, this is equally true with regard to the Statement of the Proceedings when a record was Made but is not Reported in the Transcript as Petitioner followed appropriate procedure. See Rule 10 of F.R. of App. Proc.

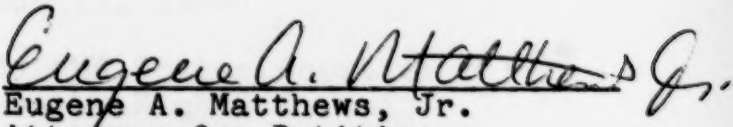
If this type of thing is permitted to be replicated, it could result in the downfall of our government in the United States. As William Pitt said, "Where law ends, tyranny begins." United States judges

occupy one of the highest positions of trust in our form of government and each should be encouraged to attain the very best that is within him.

The American Dream embraces as one of our basic rights, the right of all people to a fair trial. The Petitioner herein did not receive a fair trial and a fair appeal. At issue in this case is the fundamental constitutional guarantee of the right of a fair trial, equal protection under law and due process of law. This case raises fundamental questions about the fairness of the judicial process in this country and as the protection of the fairness of the judicial process is a substantial interest central to the maintenance of liberty, Petitioner prays that a Writ of Certiorari be issued to the United States Court of Apeals for the Eighth Circuit and that Petitioner be granted the relief he has requested and all other proper

relief.

Respectfully submitted,



Eugene A. Matthews, Jr.
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APPENDIX

1. Order of United States Court of Appeals for the Eighth Circuit filed August 13, 1984

2. Order of United States Court of Appeals for the Eighth Circuit filed August 13, 1984

3. Judgment of District Court dated September 27, 1982

4. Addendum to Judgment of District Court dated October 5, 1982

5. Order of District Court dated November 1, 1982, and filed November 2, 1982

6. Opinion of United States Court of Appeals for the Eighth Circuit submitted May 17, 1984 and filed June 26, 1984

7. Order of United States Court of Appeals for the Eighth Circuit filed August 13, 1984

8. Correspondence directing no further filings in companion case dated July 11, 1984

9. Correspondence directing no further filings in this case dated August 13, 1984

10. Provisions of the Constitution and Statutues Involved

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2282 SEPTEMBER TERM, 1983

Appeal from the United States
District Court for the
Western District of Arkansas

DARRELL R. WILLIAMS, et al.
Appellees,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Appellant.

No. 82-2310

DARRELL R. WILLIAMS, et al.
Appellants,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Appellees.

No. 82-2430

DARRELL R. WILLIAMS, et al.
Appellees,

v.

ROBERT F. LANDERS,
Appellant.

Motion for recusal of the Honorable Donald P. Lay in the above matter has been considered by the Court and is denied.

In addition, the alternative motion for en banc consideration of the motion to recuse is denied on the basis that the denial of the rehearing en banc has been entered and there is no further matter pending before the Court.

August 13, 1984

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2282 SEPTEMBER TERM, 1983

Appeal from the United States
District Court for the
Western District of Arkansas

DARRELL R. WILLIAMS, et al.
Plaintiffs-Appellees,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant-Appellant.

No. 82-2310

DARRELL R. WILLIAMS, et al.
Plaintiffs-Appellants,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendants-Appellees.

No. 82-2430

DARRELL R. WILLIAMS, et al.
Plaintiffs-Appellees,
v.
ROBERT F. LANDERS,
Defendant-Appellant.

Filed: August 13, 1984

Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and FAGG, Circuit Judge.

ORDER

The plaintiff, pursuant to Rule 15 of this circuit's rules, has petitioned this court to "correct" its mistake in the recalculation of damages. We deny the plaintiff's request for the following reasons.

In Williams v. State Farm Mut. Ins. Co., No. 82-2285, slip op. (8th Cir. June 26, 1984), we held that under the applicable law the plaintiff, Williams, could not "stack" two uninsured motorist insurance policies for purposes of recovering damages. As a result, we reduced the plaintiff's $192,700 damage award against the defendant State Farm by $100,000, the maximum amount available under the second uninsured motorist insurance policy.

Originally, the district court had held

that the defendant Landers was insured in the amount of $10,000 for injuries to each person. The court subtracted this amount from the maximum amount, $200,000, that State Farm could have been held liable for under its two uninsured motorist policies. Finally, the court held the defendants jointly and severally liable for funeral expenses in the amount of $2,700. Thus, the plaintiff was entitled to recover $192,700 from State Farm which in turn could seek recovery in the same amount from Landers.

Our decision followed the district court's formula, but because the plaintiff was not entitled to recover under both of the uninsured motorist policies, and because the maximum amount of coverage under each was $100,000, damages were reduced accordingly. Thus, Landers was held liable for the maximum amount of coverage available under his policy, $10,000. This amount was subtracted from the maximum amount available to plaintiff under one of State Farm's

uninsured motorist policies, $100,000, for a total of $90,000. Finally, the plaintiff was granted funeral expenses against State Farm in the amount of $2,700, which State Farm may seek recovery of from Landers. Thus, the total award to which the plaintiff is entitled from State Farm is $92,700.

We do not perceive any inequity in the formula for damages followed by the district court. Nor do we perceive an error in the recalculation of damages in accordance with our decision. State Farm's maximum liability was offset by Landers' maximum liability. If Landers had had no insurance, the maximum amount of the plaintiff could have recovered is $100,000, plus funeral expenses. That is the amount of recovery allowed by our decision.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

CANDACE GILBERT AND WAYNE GILBERT; DARRELL R. WILLIAMS, as Administrator of the Estate of HELEN EILEEN WILLIAMS, Deceased; DARRELL R. WILLIAMS, for and on behalf of DARRELL TYLER WILLIAMS and JAY MICHAEL WILLIAMS, Minors, as their Father and Next Friend; DARRELL R. WILLIAMS, Guardian for and on behalf of ROBYN LEE BRAKHAGE; AND DARRELL R. WILLIAMS,
PLAINTIFFS

V. NO. 80-6062

STATE FARM MUTUAL AUTO INSURANCE COMPANY and ROBERT F. LANDERS,
DEFENDANTS

ROBERT F. LANDERS,
THIRD PARTY PLAINTIFF

V.

BOB MICHAEL QUARLES
THIRD PARTY DEFENDANT

JUDGMENT

On the 16th day of August, 1982, this cause came on to be heard pursuant to prior order of the Court, with each of the parties above named appearing in person and by their respective counsel, and all

parties being before the Court and having announced ready for trial, the Court empaneled a jury consisting of John Lentini, foreperson, and eleven other qualified persons who were duly sworn by the Court to try this cause, and trial proceeded.

After receiving the evidence of the parties, and hearing the arguments of counsel for the respective parties and the instructions of the Court, the jury retired to deliberate their verdict upon a Special Verdict form consisting of interrogatories which are set forth below. On August 19, 1982, having failed to reach a verdict by the time the Court recessed on said date, the jury was excused and instructed to return the following day to resume their deliberation, which they did, and after further deliberation, on August 20, 1982, returned into the Court their Special Verdict, consisting of the said

interrogatories and the answers thereof, as follows:

SPECIAL VERDICT

"WE, THE JURY, FIND:

"INTERROGATORY NO. 1:

"Do you find from a preponderance of the evidence that Helen Eilene Williams and Candace Gilbert Graham were guests in the automobile of Bob M. Quarles?

"ANSWER YES
Yes or No

"If your answer to No. 1 is "Yes", then answer Interrogatory No. 2. If your answer to Interrogatory No. 1 is "No" then proceed to Interrogatory No. 3.

"INTERROGATORY No. 2:

"Do you find from a preponderance of the evidence that Bob M. Quarles operated his automobile in a willful and wanton manner?

"ANSWER NO
Yes or No

"INTERROGATORY NO. 3:

Do you find from a preponderance of the

evidence that Robert F. Landers was negligent?

ANSWER Yes
Yes or No

"INTERROGATORY NO. 4:

Do you find from a preponderance of the evidence that Bob M. Quarles was negligent?

"ANSWER Yes
Yes or No

"INTERROGATORY NO. 5:

"Do you find from a preponderance of the evidence that Helen Eilene Williams was negligent?

"ANSWER No
Yes or No

"INTERROGATORY NO. 6:

"Using 100% to represent the total responsibility for the occurrence and any injuries or damages, apportion the responsibility between the parties or party whom you find to be responsible.

"Robert F. Landers 90 %

"Bob M. Quarles 10 %

"Helen Eilene Williams 0 %

"INTERROGATORY NO. 7:

"State the amount of any damages which you find from a preponderance of the evidence were sustained as a result of the occurrence by:

"Candace Gilbert Graham	$10,000.00
"Wayne Gilbert	$10,000.00
"Darrell R. Williams, as as Administrator of the Estate of Helen Eilene Williams, Deceased	30,000.00
"Darrell R. Williams, as Guardian and Next Friend of Jay Micheal Williams, Darrell Tyler Williams, Minors, and as Guardian of the Person and Estate of Robyn Lee Brakhage	150,000.00
"Darrell R. Williams, Individually	50,000.00

"Date: August 20, 1982 /s/ John Lentini
Foreperson"

THE COURT HAVING FOUND prior to this cause that the liability of Defendant, State Farm Mutual Auto Insurance Company, was contingent upon Plaintiffs receiving judgment against Defendant, Robert F.

Landers, in excess of the amount of $10,000.00 for injuries to each person, and

THE COURT HAVING ADDITIONALLY FOUND that the defendant, State Farm Mutual Auto Insurance Company, had issued and had in effect, at the time the cause of action arose as alleged in the additional plaintiff's first amended complaint, two separate policies of automobile liability insurance insuring the vehicle Bob Michael Quarles was driving at such time in which Candace Gilbert Graham and Helen Eilene Williams were passengers at the time of their injuries, and upon another vehicle owned by Quarles, thus making each an additional insured in said policies against liability for damages by an underinsured motorist, in the amount of $100,000.00 for injuries to each person with a maximum aggregate for injuries received by all persons in any one accident of $300,000.00 in each policy.

THE COURT FURTHER FINDS that Defendant Robert F. Landers at such time was insured by automobile liability insurance in the amount of $10,000.00 for injuries to each person with a maximum of $20,000.00 for all persons in each accident, and therefore was an underinsured motorist, as defined in each of said insurance policies, and that said insurance company's maximum liablity to additional plaintiff Williams in his individual and representative capacities under said polices was an aggregate of $200,000.00;

The Special Verdict was accepted by the Court and ordered filed, and upon the same

IT IS CONSIDERED, ORDERED AND ADJUDGED that the plaintiffs, Candace Gilbert and Wayne Gilbert, have of and recover from defendants the sum of $20,000.00, of which amount the defendant State Farm Mutual Auto Insurance Company and the defendant Robert F. Landers have liability jointly and

severally in the amount of $10,000.00 and the defendant Robert F. Landers, solely, has liability in the amount of $10,000.00;

IT IS, FURTHER, CONSIDERED, ORDERED AND ADJUDGED that the plaintiff Darrell R. Williams, Individually, have and recover of the defendants the sum of $50,000.00;

iT IS FURTHER, CONSIDERED, ORDERED AND ADJUDGED that the Plaintiff, Darrell R. Williams, as Father and Next Friend of Darrell Tyler Williams and Jay Michael Williams and as Guardian of Robyn Lee Brakhage, have and recover of and from the defendants the sum of $150,000.00;

IT IS FURTHER, CONSIDERED, ORDERED AND ADJUDGED that plaintiff Darrell R. Williams, as Administrator of the Estate of Helen Eilene Williams, Deceased, have and recover of and from the defendants the sum of $2,700.00 which is the amount sustained by the evidence for funeral expenses;

IT SI FURTHER ORDERED that this

aggregate sum of $202,700.00 awarded to Darrell R. Williams in his various capacities as previously outlined be recovered from the defendants. Of this amount the defendant State Farm Mutual Auto Insurance Company and the defendant Robert F. Landers have liability jointly and severally in the amount of $192,700.00 and the defendant Robert F. Landers, solely, has liability in the amount of $10,000.00;

IT IS FURTHER, CONSIDERED, ORDERED AND ADJUDGED that the defendant State Farm Mutual Auto Insurance Company, have of and recover judgment over and against the defendant, Robert F. Landers, in the amount of $192,700.00 or in that amount which defendant State Farm Mutual Auto Insurance Company is required to pay to satisfy this Judgment, whichever amount is the lesser.

IT IS, FURTHER, CONSIDERED, ORDERED AND ADJUDGED that each of the judgments herein rendered shall bear interest at the rate of

10% per annum from August 20, 1982, until paid, and that each of the plaintiffs above named have and recover of defendants their cost herein laid out and expended.

DATED: September 27, 1982

/s/ Oren Harris
UNITED STATES DISTRICT JUDGE

Filed September 27, 1982
Pat L. Graham, Jr., Clerk
By Mollie S. Fletcher, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

CANDACE GILBERT, et al.,

Plaintiff

v. Case No. 80-6062

STATE FARM MUTUAL AUTO
INSURANCE COMPANY, et al.,

Defendants

ADDENDUM TO JUDGMENT

As an addendum to the judgment entered herein on September 27, 1982, it is further ordered that the Third Party Complaint against Bob Michael Quarles is hereby dismissed with prejudice.

DATED THIS 5TH DAY OF OCTOBER, 1982

/s/Oren Harris
UNITED STATE DISTRICT JUDGE

Filed October 5, 1982
Pat L. Graham, Jr. Clerk
By Mollie S. Fletcher, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

CANDACE GILBERT AND WAYNE GILBERT; DARRELL R. WILLIAMS, as Administrator of the Estate of HELEN EILEEN WILLIAMS, Deceased; DARRELL R. WILLIAMS, for and on behalf of DARRELL TYLER WILLIAMS and JAY MICHAEL WILLIAMS, Minors, as their Father and Next Friend; DARRELL R. WILLIAMS, Guardian for and on behalf of ROBYN LEE BRAKHAGE; AND DARRELL R. WILLIAMS,
PLAINTIFFS

V. NO. '80-6062

STATE FARM MUTUAL AUTO INSURANCE COMPANY and ROBERT F. LANDERS,
DEFENDANTS

ROBERT F. LANDERS,
THIRD PARTY PLAINTIFF

V.

BOB MICHAEL QUARLES
THIRD PARTY DEFENDANT

ORDER

In this civil action, a trial was held in Hot Springs, Arkansas commencing August 16, 1982. A jury returned a verdict in favor of the plaintiffs on August 20, 1982. Judgment was entered on September 27, 1982.

Counsel for defendant Robert F. Landers filed a Motion to Alter or Amend Judgment on October 7, 1982. The motion states that State Farm Mutual Automobile Insurance Company waived any right to Judgment over against Robert F. Landers due to the conduct of its counsel during the trial. Specifically, counsel for Landers argues improper remarks and argument were made by counsel for State Farm during closing arguments.

The Court has carefully reviewed the motion and memorandum filed in its support and is of the opinion the motion is without merit and should be denied. The Court was present and heard the respective closing arguments of counsel and is of the opinion the closing arguments were not improper.

The Court will deny the motion to alter or amend judgment. The Judgment on the Jury Verdict, entered September 27, 1982, shall stand as filed.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED that the Motion of Robert F. Landers to Alter or Amend Judgment be and the same is hereby denied.

DATED: November 1, 1982.

/s/Oren Harris
UNITED STATE DISTRICT JUDGE

Filed November 2, 1982
Pat L. Graham, Jr. Clerk
By Mollie S. Fletcher, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2285

DARRELL R. WILLIAMS, et. al

Plaintiff-Appellees

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant

No. 92-2310

DARRELL R. WILLIAMS, et. al

Plaintiffs-Appellants,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendants-Appellees.

No. 82-2430

DARRELL R. WILLIAMS, et al

Plaintiffs-Appellees,

v.

Robert F. Landers,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Arkansas, Hot Springs Division

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Submitted: May 17, 1984
Filed: June 26, 1984

Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and FAGG, Circuit
PER CURIAM

This diversity case principally poses the issue whether, under Louisiana law, an injured occupant of an automobile may cumulate, or "stack", the uninsured motorist coverages for two separate insurances policies issued to the owner of the automobile. This case stems from a two car collision in Arkansas. Candace Gilbert and Helen Williams were passengers in a car driven by Bob Quarles. Quarles' car was struck by a car driven by defendant Robert Landers. As a result of the collision, Williams died and Gilbert sustained serious injuries. Gilbert and her husband filed a personal injury suit against Landers and State Farm Mutual Automobile Insurance

Company, Quarles' automobile liability insurer, in federal district court in Arkansas. Both Arkansas and Louisiana law permit an injured party such as Gilbert to maintain a direct cause of action against the insurer issuing the liability policy.[1] The adminstrator of Williams' estate and Williams' husband (hereinafter collectively referred to as "Williams") were joined as plaintiffs in the suit.

[1] See Ark. Stat. Ann. Section 66-4001 (1980 Repl.) and La. R.S. 22:655.

Landers carried liability insurance of $10,00.00 per person and $20,000.00 per accident. Quarles was covered by two State Farm insurance policies, both issued in Louisiana, one policy providing uninsured motorist coverage $100,000.00 per person ($300,000.00 per accident) for the car involved in the collision, and the other policy providing identical coverage on a separate car owned by Quarles. The

Gilberts requested $350,000.00 in damages against Landers and the $100,000.00 uninsured motorist coverage limit on the State Farm policy issued for the Quarles' car Gilbert occupied at the time of the accident. Williams requested $800,000.00 in damages from Landers and $200,000.00 from State Farm. The $200,000.00 represented the combined total of the $100,000.00 uninsured motorist coverage limits for the two State Farm policies issued to Quarles.

In a pre-trial order, the district court, applying Arkansas' conflicts rules, decided Louisiana law was controlling. The court, applying Louisiana law, first concluded that Landers would be an "uninsured motorist" if the jury determined that the damages suffered by plaintiffs exceeded $20,000.00, the limit of Landers' liability coverage. The court secondly concluded that if Landers were an

"uninsured motorist", the uninsured motorist coverages on Quarles' two State Farm policies could be "stacked" to provide a possible ;coverage of $200,000.00 for each plaintiff injured in Quarles' car. On this appeal, State Farm contends this second conclusion was erroneous.

The jury found Landers 90% at fault and Quarles 10% at fault. Pursuant to a judgment entered after a jury verdict, the plaintiff Gilbert was to recover $20,000.00 from defendants State Farm and Landers. Williams was to recover $192,700.00 against Landers and State Farm jointly, and $10,000.00 against Landers solely. The court awarded State Farm judgment against Landers in the amount of $192,700.00 or the amount required by State Farm to satisfy the judgment, whichever was less.

State Farm appeals from the portion of the judgment in favor of Williams relating to the application of Louisiana law and the

"stacking" of the two State Farm insurance policies insured to Quarles. Williams cross appeals seeking recovery of attorneys' fees and expenses against State Farm pursuant to Ark. Stat. Ann. Section 66-3238 (1980 Repl.). Williams also seeks costs and expenses resulting from Landers denial of requests for admissions. Fed. R. Civ. P. 37. Landers cross appeals, claiming the district court erred in denying his motion to alter or amend the judgment granted to State Farm against Landers.

Initially we do not believe the district court erred in concluding that, under Arkansas' conflict of law rules, Louisiana insurance law was controlling. "We give great weight to the interpretation of state law [including conflict of law rules] by a federal district judge of that state." Ramsey v. Mutual of Omaha, 652 F. 2d 764, 766 (8th Cir. 1981). Under Arkansas'

conflict rules, an Arkansas court is free to apply the substantive law of a sister state where it finds that such state has the "most significant relationship" to the outcome of the issues involved. Williams v. Carr, 263 Ark. 326, 565 S.W. 2d 400, 403-4 (1978). The district court properly found that Louisiana had a significant interest because it was the state where: (1) the contracts of insurance in question were negotiated; (2) the insurance premiums were paid; (3) both parties (Quarles and State Farm) to the contracts reside and/or do business. The court also pointed out that if the contracting parties had a dispute regarding the policy provision, the matter would be litigated in Louisiana.

Under Louisiana law, there is really no dispute that Landers would be considered an "uninsured motorist" since the damages to Williams far exceed the liability coverage on Landers' vehicle. La.R.S. 22:1406 (D)

(2) (b). The principal dispute here centers on whether, under Louisiana law, the uninsured motorist coverages on the two State Farm policies issued to Quarles could be "stacked" to provide greater recovery to Williams, since the deceased Helen Williams was an occupant of Quarles' automobile. The district court concluded that the tow policies could be stacked for a total coverage to Williams of $200,000.00.

The Louisiana Uninsured Motorist Statute, La.R.S. 22:1406 requires that insurance policies provide uninsured motorist coverage for a person who qualifies as an "insured" under the policy.[2] Malbrough v. Wheat, 428 S. 2d 1110, 1113 (La. App, 1st Cir. 1983). Thus, as the Louisiana Supreme Court clarified in Seaton v. Kelly, 339 So. 2d 731, 733 (La. 1976), "[t]he question of 'stacking' [uninsured motorist coverages] only arises once it is determined that the person seeking to

cumulate benefits on two or more uninsured motorist coverages is an insured under the terms of those policies." Accord, Block v. Reliance Insurance Co., 433 So. 2d 1040, 1045 (La. 1983) ("The question of stacking only arises when it is determined that the person seeking to accumulate benefits is an insured under the terms of the policies he is seeking to stack." Citing Seaton v. Kelly); Suhor v. Gusse, 403 So. 2d 83, 94 (La. App. 1981) (on application for rehearing per curiam).

The two Quarles' policies define "insured" for the purposes of uninsured motorist coverage as follows:

> "Insured" means:
> (a) the named insured and any relative;
> (b) any other person while occupying an insured automobile; and

---

[2] The mandatory uninsured motorist coverage of La.R.S. 22:1406 (d) (1) (a) provides in part:

"no automobile liability insurance

(c) any person, with respect to damages he is entitled to recover because of bodily injury to which this part applies, sustained by an insured under (a) or (b) above.

Williams, neither a named insured nor a relative of the named insured, could qualify as an "insured" only under paragraph (b) -- i.e., as a "person while occupying an insured automobile." "Insured automobile" is defined by both policies as "an automobile described in the policy for which a specific premium charge indicates that coverage is afforded". Thus, Williams qualified as an "insured" only under the

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covering liability arising out of the owner ship, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, ... for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured or underinsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom;..." (Emphasis added).

policy covering the Quarles' vehicle she was occupying at the time of the accident. She did not qualify as an insured under the policy covering Quarles' other automobile and thus she was not entitled to the uninsured motorist coverage under that policy.

Our holding here is in line with Seaton v. Kelly, 339 So. 2d 731 (La. 1976), a Louisiana Supreme Court case "on all fours" with this case. In Seaton v. Kelly, an owner had two separate State Farm policies, one policy covering his Ford truck and the other coverage on his Volkswagen automobile. Each policy provided uninsured motorist coverage and contained definitions of "insured" and "insured automobile" identical to the definitions in the Quarles' policies here. The plaintiff Seaton was a passenger in the Ford pick-up truck when it collided with a car driven by an uninsured motorist. Seaton sustained

injuries from the collision and sought to recover the uninsured motorist limits under both the policy insuring the Ford and the policy insuring the Volkswagen. In other words, Seaton, like Williams here, sought to "stack" the uninsured motorist coverages under the owner's two policies. The court permitted recovery under the policy insuring the Ford, but not the policy insuring the Volkswagen. The Seaton court reasoned:

> The issue is not whether plaintiff can "stack" the uninsured motorist coverages on the two policies issued to Kelly. the question of "stacking" only arises once it is determined that the person seeking to cumulate benefits on two or more uninsured motorist coverages is an insured under the terms of those policies...
>
> ...Since by the clear terms of the policy in this case..., the plaintiff was not occupying the automobile "described in the policy for which a specific premium charge indicates that coverage is afforded..." (the Volkswagen), he was not occupying the "insured automobile." As such he was not an "insured" under the Volkswagen policy and is, therefore, not entitled to the benefits contained therein.

Id., 339 So. 2d at 733, 735

Seaton's holding was followed in Suhor v. Gusse, 403 So. 2d 83 (La. App. 1981), a case in which an injured passenger sought to stack the uninsured motorist coverages of the defendant's six separate insurance policies. The court , referring to Seaton, stated:

> The case before us is identical in respect to stacking; it is a case in which stacking does not become an issue because plaintiff is not an insured under any policy except the one covering the vehicle he was occupying. He is therefore not entitled to any benefits provided by any other policy.

Id. at 94

Williams, like the plaintiffs in Seaton and Suhor, could not stack because she was not insured under any policy except the one covering the vehicle she was occupying at the time of the accident.

Louisiana's "Anti-stacking Act" (Act 623 of 1977), which became effective September 9, 1977, does not alter Seaton"s holding.

The Act amended La.R.S. Section 22:1406 (D) (1) (c) to prohibit stacking of uninsured motorist coverages except under certain designated circumstances.[3] The pertinent Language of the amended La.R.S. 22:1406 (D) (1) (c) is:

> "If the insured has any limits of uninsured motorist coverage in a policy of automobile liability insurance, in accordance with the terms of Subsection D(1), then such limits of liability shall not be increased because of multiple motor vehicles covered under said policy of insurance and such limits of uninsured motorist coverage shall not be increased when the insured has insurance available to him under more than one uninsured motorist coverage provision or policy; provided, however, that with respect to other insurance available, the policy of insurance or endorsement shall provide the following:

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[3] "The purpose of the Act was to prevent "stacking of uninsured/underinsured motorist insurance policies and coverage which had been allowed by the jurisprudence prior to the amendment". Duhe v. Maryland Cas. Co., 434 So. 2d 1193, 1196 (La. App. 1 Cir. 1983).

> "With respect to bodily injury

> to an injured party while occupying an automobile not owned by said injured party, the following priorities of recovery under uninsured motorist coverage shall apply:
>
> "(i) The uninsured motorist coverage on the vehicle in which the injured party was an occupant is primary;
>
> "(ii) Should that primary uninsured motorist coverage be exhausted due to the extent of damages, then the injured occupant may recover as excess from other uninsured motorist coverage available to him. In no instance shall more than one coverage from more than one uninsured motorist policy be available as excess over and above the primary coverage available to the injured occupant."

(Emphasis added).

Under this amendment, the injured occupant is permitted to stack only when he has "other uninsured motorist coverage available to him. This language should be read in conjunction with 11:1406 (D) (1) (a)[4], the subsection relied on in Seaton, which provides that an automobile liability

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[4] See supra note 1.

policy that an automobile liability policy

includes uninsured motorist coverage "for the protection of persons insured thereunder." Since Williams, like the plaintiffs in Seaton and Suhor, was only "insured" under the policy covering the car she occupied, she cannot pass the initial hurdle of having "other uninsured motorist coverage available to him."

Our interpretation here was implicitly adopted in Block v. Reliance Ins. Co., 433 So. 2d 1040, 1045 (La. 1983), where the Louisiana Supreme Court concluded:

> The question of stacking only arises when it is determined that the person seeking to cumulate benefits is an insured under the terms of the policies he is seeking to stack. Seaton v. Kelly, supra, R.S. 22:1406 (D)(1)(a) requires that no automobile liability insurance shall be delivered in this state unless uninsured motorist coverage is provided therein "for the protection of persons insured thereunder".

Considering the language of La.R.S. 22:1406, as amended by the "Anti-stacking Act", and the above quoted statement from

Block, we have little doubt as to the continued validity of Seaton in Louisiana.

In support of its conclusion permitting stacking, the district court improperly relied on Courville v. State Farm Automobile Ins. Co., 393 So. 2d 703 (La. 1981), where the Louisiana Supreme Court held that under La.R.S. 22:1406 (D)(1)(c) (The Anti-Stacking Act), uninsured motorist coverage for two separate policies could be stacked if the plaintiff, relative of the named insured under the policies, was injured while occupying a vehicle owned by the named insured. In Courville, the plaintiff was a close relative of the named insured, and thereby qualified as an "insured" under both of the State Farm insurance policies he sought to stack. Thus, the plaintiff in Courville, unlike Williams and the plaintiffs in Seaton and Suhor, met the threshold stacking requirement of having "other uninsured motorist coverage

available to him".[5]

Therefore, since Williams was not entitled to recover as an "insured" under the second State Farm policy -- the policy covering the Quarles' car she did not occupy at the time of the accident -- we reduce Williams' award against State Farm by the sum of $100,000.00.

The remaining issues on this appeal can

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[5] During oral argument, Williams relied on Duhe v. Maryland Cas. Co., 434 So. 2d 1193 (La. App. 1 Cir. 1983), where the court interpreted Courville without discussing the requirement that the injured-occupant must be an "insured" under the terms of the policies he seeks to stack. Id. at 1197. Duhe is of little aid to Williams. First, from the opinion it is impossible to tell whether the plaintiff-occupant was "insured" under the terms of the second policy he sought to stack. Second, Duhe actually held that the plaintiff could not stack because he had not exhausted the primary coverage. Third, Duhe, an appellate court opinion, has no precedential value to the extent that it may conflict with the Louisiana Supreme Court's holding in Seaton, a holding that was reaffirmed by the Louisiana Supreme Court in Block v. Reliance Ins. Co., 433 So. 2d 1040, 1045 (La. 1983).

be disposed of with little discussion. Williams claims that, under Ark. Stat. Section 66-3238 (1980 Repl.), he was entitled to recover from State Farm a 12% penalty and reasonable attorneys' fees based on State Farm's refusal to pay Williams the limits of the uninsured motorist coverage for both of the policies issued to Quarles. State Farm clearly cannot be assessed the penalty and fees on the second policy -- representing $100,000.00 in coverage -- because Williams was not entitled to recover under that policy. And, because State Farm offered the $100,000.00 uninsured motorist limit on the policy covering Williams, it cannot be assessed Fees and expenses for failure to make payment on demand with respect to that policy. See Broadway v.Home Ins. Co., 203 Ark. 126, 155 S.W. 2d 889 (1942); Clark v. New York Life Ins. Co., 245 Ark. 763, 434 S.W. 2d 611, 613 (1968).

Williams asserts that Fed.R.Civ.P. 37(c) mandates fees and costs resulting from Landers' denial of request for admission regarding elements of negligence -- specifically Landers' state of legally defined intoxication at the time of the accident. In denying this claim, the district court specifically rejected Williams' contention that Landers' failure to admit was done in bad faith. In doing so, the district court necessarily must have found that Landers "had reasonable grounds to believe that he might prevail on the matter, or ...[that] there was other good reasons for failure to admit". Fed.R.Civ.P. 37(c)(3)&(4). Reviewing the record, we are unprepared to say that the district court abused its broad discretion in denying fees and costs under Rule 37 (c).

Finally, Landers claims State Farm should not have been awarded judgment over

and against him. State Farm was clearly entitled to judgment over and against Landers based upon the jury's finding of liability on the part of Landers, which required State Farm to assume liability under its uninsured motorist coverage.[6] We reject as frivolous Landers' contention that State Farm's counsel prejudiced Landers by allegedly making improper closing argument. State Farm's counsel did not mislead the jury, but frankly and accurately stated State Farm's position with respect to assuming responsiblity for the damages the plaintiffs sustained in the accident.

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[6] Landers suggests that the court should not have entered judgment in favor of State Farm against Landers until after State Farm paid the judgment. However, the judgment states:

> "It is further considered, order and adjudged that the defendant State Farm Mutual Auto Insurance Company have of and recover judgment over and against the defendant, Robert F. Landers, in the

Judgment in accordance with the opinion. Costs assessed against Landers and Williams.

A true copy.

Attest

Clerk, U.S. Court of Appeal Eighth Circuit

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amount of $192,700.00 or in that amount which State Farm Mutual Auto Insurance Company is required to pay to satisfy this judgment, whichever is the lesser." (Emphasis added).

The language clearly indicates that State Farm, if ultimately found liable for some or all of the judgment, must satisfy the joint and several judgment against State Farm and Landers before actually recovering from Landers.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2282 SEPTEMBER TERM, 1983

Appeal from the United States
District Court for the
Western District of Arkansas

DARRELL R. WILLIAMS, et al.
Appellees,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Appellant.

No. 82-2310

DARRELL R. WILLIAMS, et al.
Appellants,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Appellees.

No. 82-2430

DARRELL R. WILLIAMS, et al.
Appellees,
v.
ROBERT F. LANDERS,
Appellant.

The petition of Robert F. Landers for rehearing en banc has been considered by the Court and is denied.

The petition for Darrell R. Williams for rehearing by the panel is also denied.

It is further ordered that appellant Landers' motion for production of tapes be, and it is hereby, denied in all particulars.

August 13, 1984

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert D. St. Vrain
Clerk

314-425-5600
FTS: 279-5600

July 11, 1984

Mr. Gene Matthews, Jr.
Attorney at Law
424 Ouachita Avenue
Hot Springs, Arkansas 71901

Re: No. 83-2450-WA. Willie R. Bratton, etc. v. Safeway Stores, Inc.

Dear Mr. Matthews:

This office received and distributed to the Court your Objections and the memorandum brief in the referenced case. I have been directed by the Court to inform you that further filings in this case will be returned to you unfiled. You had indicated that a second petition for rehearing would be filed. Please do not forward a second petition for rehearing to this office because it will have to be returned to you.

Your motion for stay of mandate is still pending before the Court and you will be notified when the Court issues an order.

Sincerely,

Robert D. St. Vrain
Clerk of Court

RSTV/rmh

cc: Ms. Bevely A. Rowlett &
Mr. Ralph R. Wilson

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert D. St. Vrain
Clerk

314-425-5600
FTS: 279-5600

August 13, 1984

Mr. Gene Matthews, Jr.
Attorney at Law
424 Ouachita Avenue
Hot Springs, Arkansas 71901

Re: Nos. 82-2285/2310/2430-WA.
Darrell R. Williams, etc. v.
State Farm Mutual Auto
Insurance, et al.

Dear Mr. Matthews:

Enclosed please find copy of order entered today at the direction of the Court.

I have been instructed by the Court to inform you that no further filings will be received by this Court concerning this case. Your failure to adhere to this Court's direction in that regard could result in sanctions being imposed against you.

Sincerely,

Linda L. Penberthy
Senior Deputy Clerk

LLP/rmh
Enclosure

PROVISIONS OF THE CONSTITUTION AND STATUTES INVOLVED

ARTICLE VI

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[3] The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

AMENDMENT V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VII [1971]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried to jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 U.S.C., §453.

OATH OF JUSTICES AND JUDGES

Each justice or judge of the United States shall take the following oath or affirmative before performing the duties of his office: "I _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God."

Title 28 U.S.C., §144.

BIAS OR PREJUDICE OF JUDGE

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel or record stating that it is made in good faith.

Title 28 U.S.C., §455.

DISQUALIFICATION OF JUSTICE, JUDGE, OR MAGISTRATE

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding;...

Title 28 U.S.C. §1254

COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Title 28 U.S.C. §1332

DIVERSITY OF CITIZENSHIP; AMOUNT IN CONTROVERSY; COSTS

(a) The dsitrict courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between--

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b)...

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be

deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

Title 28 U.S.C. §1651

WRITS

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

(As amended May 24, 1949, c. 139, §90, 63 Stat. 102.)

Title 28 U.S.C. §2101(c)

SUPREME COURT; TIME FOR APPEAL OR CERTIORARI; DOCKETING; STAY

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.